No. 11295.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Introductory Statement.

This appeal involves a case of serious moment. The indictment charged the defendant and appellant with the crime of willful murder of the captain of an American vessel while said vessel was in the waters of the Pacific Ocean. The trial resulted in a conviction of the crime of voluntary manslaughter. The evidence was entirely circumstantial. There were no eye witnesses to the shooting. The trial court, itself, was of the opinion that "the case was not a strong one" [R. 108, top]. It is the earnest contention of appellant and his counsel that the evidence introduced at the trial was insufficient in its nature, character and weight to justify its submission to the jury; that it was likewise insufficient to sustain the verdict of the jury finding the defendant guilty of voluntary manslaughter; and that the Court should have granted the various requests and motions of the defendant for an instructed verdict of not guilty.

Statement of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

Jurisdiction of the District Court.

The conviction and judgment from which the appeal is taken was based upon an indictment returned and filed by a Grand Jury in the District Court of the United States for the Southern District of California. In this indictment [R. 2] it is charged that on or about December 9, 1945, defendant, Francis P. O'Leary, on board a steamship belonging to the United States, within admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State and while said vessel was in the waters of the Pacific Ocean, at or near Manus Island, did wilfully, unlawfully, feloniously and with malice aforethought, kill and murder a human being, to-wit: one Austin Stuart Fithian, by shooting said Austin Stuart Fithian with a pistol with intent to kill him, thereby causing his death.

The crime charged in the indictment is that of murder, as defined in Criminal Code, Sec. 273; Title 18, U. S. C., Sec. 452. It is charged that this crime of murder was committed on an American vessel within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any State, and it, therefore, follows that it was punishable under the provisions of Criminal Code, Sec. 272; Title 18 U. S. C., Sec. 451. The punishment for said crime of murder, as so charged, as well as for the crime of voluntary manslaughter, of which defendant was convicted, is prescribed by the provisions of Criminal Code, Sec. 275; Title 18 U. S. C., Sec. 454. The crime of voluntary manslaughter is defined in Criminal Code, Sec. 274; Title 18 U. S. C., Sec. 453.

The plaintiff, United States of America, invoked the jurisdiction of said District Court under and by virtue of the provisions of Section 24 of the Judicial Code, as amended (Title 28, U. S. C., Section 41(2) Second). The provisions of this last cited section expressly vest in the District Court of the United States the original jurisdiction of crimes and offenses cognizable under the authority of the United States.

A written stipulation [R. 33] concerning the jurisdiction of the Court was entered into between the parties prior to the trial. This stipulation, after expressly reserving and protecting all rights of the defendant cognizable under his plea of not guilty [R. 33] stipulated:

> "3. That as of the dates of the offense charged in the herein indictment, to-wit: on or about December 9, 1945, the steamship SS 'Arthur R. Lewis' was at said time and place a vessel 'belonging' to the United States, by and through its corporations; namely, The War Shipping Administration or the United States Maritime Commission.
>
> 4. It is further stipulated that if any offense was committed as charged in the indictment, that the offense charged in the instant indictment was committed aboard the steamship 'Arthur R. Lewis,' a vessel belonging to the United States while said vessel was in the waters of the Pacific Ocean near Manus Island on or about December 9, 1945, within admiralty and maritime jurisdiction of the United States, and said offense is subject to prosecution in the herein court.
>
> 5. It being fully understood and agreed that no issue at time of trial, or otherwise, will be raised by the defendant on the question of jurisdiction of

the herein Federal Court to try the offense charged in the herein indictment."

Venue of this prosecution in the lower court under the above stipulation is prescribed by the provisions of Section 41 of the Judicial Code (Title 28, U. S. C., Chapter 4, Section 102).

Jurisdiction of ~~this Court~~ the District Court:

The jurisdiction of this Court appears from the indictment [R. 2]; the plea of not guilty [R. 3] and the judgment and sentence of the District Court [R. 23] and the Notice of Appeal [R. 25]. Jurisdiction is invoked under Section 128 of the Judicial Code as amended (U. S. C. A. Title 28, Chap. 6, Section 225(a) First, p. 294).

Statement of the Case Presenting the Questions Involved and How Raised.

The indictment charged the defendant with the crime of murder committed on board an American vessel on the high seas. To this indictment the defendant pleaded not guilty [R. 3]. The particular allegations of the indictment have been heretofore set forth (*supra,* p. 2). The evidence for the Government was entirely circumstantial. At the close of the Government's case, the defendant moved the Court to instruct the jury to render a verdict of not guilty [R. 107] on the ground that the evidence was insufficient to sustain a verdict of guilty. This motion was argued and submitted to the Court. Whereupon, the Court stated that "although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine," and denied the motion [R. 107-108]. To this ruling defendant entered his exception [R. 108].

Defendant rested his case without introducing any testimony or evidence and thereafter again renewed the motion for an instructed verdict of not guilty on the same grounds as heretofore stated, which motion was, by the Court, denied [R. 108].

In addition to the above mentioned two motions for an instructed verdict of not guilty, the defendant presented a written instruction to the jury and requested the Court to give the same. Said requested instruction [R. 19] read as follows:

"Instruction No. 1

You are instructed to find the defendant not guilty."

This written requested instruction was refused and not given by the Court [R. 19].

It is upon the rulings of the Court in denying these motions, and refusing to give the written, requested instruction that this appeal is based.

Statement of Questions Involved.

1. Whether or not the evidence, taken as a whole, was sufficient to justify its submission to the Jury for its determination of defendant's guilt or innocence.

2. Whether or not the evidence was sufficient to sustain the Jury's finding that defendant was guilty of the crime of voluntary manslaughter.

3. Whether or not the evidence was sufficient to overcome the presumption of defendant's innocence and to sustain the Jury's finding that defendant was guilty of the crime of voluntary manslaughter.

4. Whether or not, the evidence, the same being entirely circumstantial, and all reasonable inferences which

might be drawn therefrom, excluded every reasonable hypothesis except that of guilt.

5. Whether or not the evidence, the same being entirely circumstantial, together with all reasonable inferences which might be drawn therefrom was as consistent with the hypothesis of innocence as with that of guilt.

Specifications of Errors.

1. The District Court erred in denying the motion of defendant's counsel made at the trial and immediately after the Government had rested its case that the Court instruct the Jury to find the defendant not guilty. Said motion with the proceedings and ruling of the Court thereon were as follows [R. 107-108]:

> "Mr. McCormick, Counsel for defense, orally moved the Court to instruct the jury to find the defendant not guilty on the grounds that the evidence offered was insufficient to sustain a verdict or judgment of guilt. He stated that, considering the evidence offered as a whole, but one reasonable view could be taken thereof, and the conclusions to be drawn therefrom and such view failed to meet the requirements that it excluded every other reasonable hypothesis but that of guilt, and further that all of the evidence and the conclusions that could be drawn therefrom was as consistent with the innocence of the defendant as with his guilt.
>
> Arguments on the motion were offered by Counsel for both sides and the matter submitted to the Court for its decision. Whereupon, the Court denied the

motion, stating that although the case was not a strong one, the Court felt that the evidence presented a question of fact for the jury to determine.

An exception to the ruling of the Court on defendant's motion was requested by Counsel for the defendant and allowed by the Court."

2. The District Court erred in denying the motion of defendant's Counsel, made at the trial after the defendant had rested his case, that the Court instruct the jury to find defendant not guilty [R. 108].

3. The District Court erred in refusing to give the written instruction requested by defendant, which said written, requested instruction was in the words following to-wit [R. 19]:

"Comes now the defendant in the above-entitled action and requests the Court to instruct the jury as follows:

Instruction No. 1.

You are instructed to find the defendant not guilty."

4. The District Court erred in denying defendant's motion for a new trial [R. 22].

5. The District Court erred in rendering, making and entering the judgment and sentence [R. 23] from which this appeal is taken.

ARGUMENT.

I.

Burden of Proof.

It was incumbent upon the Government to prove every essential element of the crime of voluntary manslaughter, and this by substantial evidence and beyond a reasonable doubt. One of these essentials, indeed the most vital one, was defendant's participation in the shooting of Captain Fithian.

These propositions are so well settled—are so elementary—that we deem it unnecessary to cite authorities to this effect.

II.

The Defendant Was Entitled to an Instructed Verdict of Not Guilty.

The defendant, at the close of the Government's case, moved the Court to instruct the jury to render a verdict of not guilty [R. 107-108]. This motion was again renewed after defendant had rested his case [R. 108]. Both of these motions were made on the ground of the insufficiency of the evidence to authorize or sustain a verdict of guilty, in that the evidence, taken as a whole, failed to exclude every reasonable hypothesis, except that of guilt, and that all of the evidence and the conclusions that could reasonably be drawn therefrom were as consistent with the innocence of the defendant as with his guilt.

Each of these motions was denied by the Court [R. 107-108]. These rulings of the Court are assigned as errors herein under Specifications No. 1 and No. 2 (*supra*, p. 6 & 7)

The Court also refused to give the written instruction requested by defendant instructing the jury to find the defendant not guilty [R. 19]. This refusal is assigned as error in Specification of Errors No. 3 (*supra*, p. 7).

A. The Law of the Federal Courts as to When an Accused Is Entitled to an Instructed Verdict of Not Guilty in Criminal Cases.

The Federal Courts, including this Court, have, in a long line of decisions, laid down the rule that, in criminal cases where the evidence is circumstantial, an accused is entitled to, and the trial court must give, an instruction to the jury to return a verdict of not guilty unless there is substantial evidence of facts which excludes every other reasonable hypothesis than that of guilt, and that such evidence must be inconsistent with every reasonable hypothesis of innocence.

Paddock v. United States (C. C. A. 9), 79 F. (2d) 872;

Kennedy v. United States (C. C. A. 9), 44 F. (2d) 131;

Paul v. United States (C. C. A. 3), 79 F. (2d) 561;

Philyaw v. United States (C. C. A. 8), 29 F. (2d) 225;

Neal v. United States (C. C. A. 8), 102 F. (2d) 643;

Gargotta v. United States (C. C. A. 8), 77 F. (2d) 977;

Geo. A. Breon & Co. Inc. v. United States (C. C. A. 8), 74 F. (2d) 4;

Hammond v. United States (C. C. A. D. C.), 127 F. (2d) 752.

Kennedy v. United States, supra, involved a case in which defendant had made a motion for an instructed verdict of not guilty at the close of the Government's case, and upon its denial had rested without the introduction of any evidence. This Court, in reversing the judgment and conviction, used the following language (44 F. (2d) 131 at 132):

> "Circumstantial evidence, of itself, is sufficient to convict if the circumstances are consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt."

The principles announced by this Court in *Paddock v. United States, supra,* while directed to the consideration of certain instructions given by the trial court, are equally applicable to the point now under discussion. In that case, this Court used the following language (79 F. (2d) 872 at 875):

> "These instructions were erroneous. The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, Sec. 2491, *et seq.* We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge.

The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The Circuit Court of Appeals of the Third Circuit, in *Paul v. United States, supra* while considering the principle now under discussion, stated the rule as follows (79 F. (2d) 561 at 563):

". . . 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' *Hart v. United States,* 84 F. 799, 808, 28 C. C. A. 612; *Union Pacific Coal Co. v. United States,* 173 F. 737, 740, 97 C. C. A. 578; *Wright v. United States,* 227 F. 855, 857, 142 C. C. A. 379; *Joseph Wiener, et al. v. United States* (C. C. A., 282 F. 799, 801).

At the conclusion of the government's case, Paul moved for binding instructions of 'not guilty' on each of the two counts. This was denied, and an exception was noted. Again at the conclusion of the case, Paul moved for a direction of a verdict of 'not guilty,' and this motion was likewise denied. In denying these motions the learned court erred.

The evidence is insufficient to support the verdict, and the judgment is reversed."

B. Where Evidence Is as Consistent With Innocence as It Is With Guilt, It Is Insufficient to Authorize a Conviction.

Neal v. United States (*supra.*) In this case, the language hereinafter quoted was used in connection with the consideration of the question as to whether or not a certain sum of money, which it was shown had been stolen, had been, in fact, stolen before, or after a certain date. Defendant was charged with having aided in the concealment of the stolen money. To constitute the offense charged, the money must have been stolen after the date above referred to. The evidence failed to show whether it was stolen before or after the date. In this connection, the Court said (102 F. (2d) 643, at 648):

> "The proof clearly does not tend to show that the $5,903 was a part of the 'fruits or proceeds of the offense' of the principal, that is, that it was money stolen by John after rather than before August 24, 1937. Evidence which is consistent with each of two hypotheses proves neither, *Prudential Insurance Company v. King*, 8 Cir. 101 F. (2d) 990, decided February 25, 1939; and when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction, *Shama v. United States,* 8 Cir. 94 F. (2d) 1, 4; *Fulbright v. United States,* 8 Cir. 91 F. (2d) 210; *Haning v. United States,* 8 Cir. 21 F. (2d) 508; *Wright v. United States,* 8 Cir. 227 F. 855. Nor is there any presumption in the absence of proof that the $5,903 was a part of the money stolen after August 24, 1937, rather than that it was a part of the money stolen before that date. *United States F. & G. Co. v. Des Moines Nat. Bank,* 8 Cir. 145 F. 273, 279."

III.

The Insufficiency of the Evidence.

(Note: Owing to a typographical error, a witness, whose true and correct name is LEWIS THOMAS WATSON, is erroneously designated at pages 48 to 53, both inclusive, of the printed transcript herein as LEWIS THOMAS WALSH. See stipulation filed herewith. In this brief the correct name is used.)

A. It Is Entirely Circumstantial.

There were no eye witnesses to the shooting of Captain Fithian.

B. Deficiencies in the Evidence.

(1) THE ABSENCE OF EVIDENCE SHOWING DEFENDANT'S PARTICIPATION IN THE SHOOTING.

There is no evidence showing that defendant was located, either before or at the time the shots were fired, at a place from which the shots might have been fired. The last seen of him prior to the shooting about three to five minutes before the shots were heard [Test. Watson, R. 48], he was on a lower deck going through a door in the passageway [Test. Cooper, R. 43, R. 45].

The first person who saw defendant after the sound of the shots was heard was witness James M. Kennon, the purser of the ship. This witness heard the shots while in his own cabin which was adjacent to the captain's bedroom, and on the starboard side of the ship. To get to the door of the captain's office he had to go to the opposite side of the ship and then head toward the front of the ship to point A on Government's Exhibit No. 1

[R. 37] and to the left and continue down that passageway to the door of the captain's office, which is point B on said exhibit. This witness saw defendant at a point on the same deck as the captain's quarters, but in a passageway either at the head of the stairs or at point C. In other words, at least 12 to 14 feet away from the door leading to the captain's office [Test. Zents, R. 57]. Defendant then turned around from point A and staggered back [Test. Kennon, R. 94] to the captain's door [Test. Kennon R. 92] where he, defendant, was standing when first seen by the witness Zents [R. 57]. Zents testifies that only 20 to 30 seconds expired between the time he heard the shots while he was in his own room on the lower boat deck on the starboard side of the ship [R. 56] until he saw defendant in the doorway mentioned [R. 58].

The witness Kennon does not state the time which elapsed between the time he heard the shots and the time defendant was in the door to the captain's office, but, as heretofore shown, he describes in detail his own actions and those of defendant during that interval and it would seem to follow therefrom that a much longer period of time than one-half a minute must have elapsed.

There is no evidence as to the point or place from which the shots were fired, whether from the inside of the room in which the body was found, or from the outside. There is no evidence that defendant was in the captain's office before or when the shots were fired.

There is no evidence as to who fired the gun, nor as to where the person who fired it was located. There is evidence that the gun which was found on the floor at the feet of the captain was one of three guns usually

kept in a filing cabinet in the captain's office [Test. Kennon, R. 95], but as to how or under what circumstances the person who fired it procured or obtained it, the evidence is silent.

There is no evidence as to how or where the gun was procured, nor as to how it got from the hand that fired it to its place on the floor near the dead captain's right foot.

(2) Absence of Evidence as to Finger Prints.

A very significant omission in the Government's case is its absolute failure to prove the finger prints on the gun, or to offer any explanation for the absence of such proof. It is reasonable to presume that the hand which held the gun when it was discharged left its finger prints thereon. This would have been vital and perhaps conclusive evidence that the person whose finger prints corresponded with those found on the gun fired the fatal shots. If it be argued that there may have been no finger prints on the gun, then why did the Government not show this to be a fact. Great care was taken to carefully pick up the gun from the floor and place it in a handkerchief and give it into the possession of one of the naval officers [Test. Kennon, R. 95; Test. Zents, R. 73; Test. Noble, R. 101].

Here, we submit, we find a situation which calls for the application of the well-known rule of evidence that where the party who has the burden of proof contents himself with the production of weaker evidence when stronger and more satisfactory evidence is available to him; a presumption is raised that the stronger evidence,

if produced, would, at least, be adverse to him if not wholly conclusive against his contentions.

Interstate Circuit, Inc. v. U. S. of America (Tex.), 306 U. S. 208, 83 L. Ed. 610;

Clifton v. United States, 4 How. 242, 247, 11 L. Ed. 957, 959;

Hung You Hong v. United States (C. C. A. 9), 68 F. (2d) 67.

In this connection, we quote from the leading case of *Clifton v. United States, supra,* the following language of the Supreme Court of the United States (4 How. 242, 247, 11 L. Ed. 957, 959):

> "One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party."

In *Interstate Circuit, Inc. v. United States of America* (Tex.), 306 U. S. 208, 83 L. Ed. 610, the Court laid down the rule in the following language (306 U. S. 208 at 223, 83 L. Ed. 610 at 620):

> "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States,* 4 How. 242, 247, 11 L. Ed. 957, 959. Silence then becomes evidence of the most convincing character."

(3) Absence of Explanation of Bloody Foot Print.

The witness Zents [R. 74] testified that after the shooting he observed a piece of paper on the deck of the Captain's stateroom with what appeared to be a bloody foot print thereon. He further testified that it was his impression that one of the Naval Officers took this piece of paper into his possession. It does not appear as to what is meant by "foot print", whether or not it was that of a bare foot or a foot encased in a sock or shoe. In any event, the object which made the impression would undoubtedly have some evidence of blood stains thereon. There is a stipulation [R. 107] to the effect that the Government had in its possession the shirt and trousers worn by O'Leary at the time, and that said articles of clothing did not possess any blood stains. At the time the officers visited the defendant in his cabin after the shooting and placed handcuffs on him he had his socks on [Test. Meacham, R. 88]. Presumably, if they had the shirt and trousers they likewise had or might have had the shoes or socks, if any were worn by the defendant. Also, there are a number of witnesses who testify that no blood stains were seen on the person of defendant [Test. Berge, R. 102], although

two of them testify that when they saw defendant in his bunk after the shooting they observed a spot on one of his forearms (they do not know which forearm) which might have resembled blood. Although Zents handcuffed him, he makes no mention of seeing the blood stains. The absence of explanation of the bloody foot print and the failure to connect defendant therewith is significant.

(4) Lack of Motive, Ill Will or Provocation.

There is no evidence, direct or indirect, of any motive, hatred, envy or ill-will existing on defendant's part against the Captain.

The relations between the first mate, defendant, and the Captain were friendly [Test. Kennon, R. 93].

So far as defendant is concerned, there is an absolute dearth of evidence as to any motive on his part to kill the Captain. This is a circumstance strongly favorable to defendant's innocence. Thus, in *Osbon v. State,* 213 Ind. 413, 13 N. E. (2d) 223, the Indiana Supreme Court, in a homicide case based on circumstantial evidence, in discussing the significance of the lack of evidence of motive, used the following language (13 N. E. (2d) at 228):

> "There is no motive disclosed by the record for the appellant to have poisoned Kenneth Roth. We recognize that it is not absolutely necessary for a motive to be shown, but as said in the case of *People v. Lewis,* 1937, 275 N. Y. 33, 9 N. E. 2d 765, 769 'The evidence as a whole establishes a strong lack of motive and its absence is a powerful circumstance in the exculpation of the defendant where reliance is placed entirely upon circumstantial evidence to establish the crime.' "

(5) There Is No Evidence of Flight or Resistance to Arrest.

There is no evidence of any attempt on defendant's part to flee or to resist arrest. After being seen in the doorway to the Captain's office, he went through the wheelhouse [Test Kennon, R. 94] and down to his own quarters on the lower boat deck, where he was subsequently found in his bed and handcuffed by the second mate, Zents [Test. Berge, R. 103].

C. Particular Circumstances Considered.

(1) The Opportunity to Commit the Crime.

In a criminal case based on circumstantial evidence, the fact, if it be a fact, that the accused had an opportunity to commit the crime, is undoubtedly a relevant circumstance to be taken into consideration. But this fact, of itself, is insufficient to establish guilt, and this is especially true if the evidence shows that some other person also had such opportunity. Indeed, the burden is upon the prosecution to show that no person other than accused had such opportunity in order to give the evidence of accused's opportunity any weight of itself.

People v. Holtz et al. (Ill.), 294 Ill. 143, 128 N. E. 341;

Osbon v. State (Ind.), 213 Ind. 413, 13 N. E. (2d) 223, at 227;

Philyaw v. U. S. (C. C. A. 8), 29 F. (2d) 225.

People v. Holtz (128 N. E. 341), cited above is directly in point in connection with the point we are now discussing. It was a case wherein the defendants were charged with murder. The evidence was entirely circumstantial

and established the fact beyond a doubt that the defendants were present at the time and scene of the crime and had an opportunity to commit it. In addition to this, the prosecution proved a possible motive for the commission of the crime, an element which is entirely lacking in the instant case. In its consideration of the question of the sufficiency of the evidence to sustain the conviction the Illinois Supreme Court used the following language (128 N. E. pp. 344-345):

> "It proves that a murder was committed, that Mrs. Holtz was present when her husband was shot, and that Mrs. Whisman was in the house. It does not connect them otherwise with the fact of the shooting, or show that the crime was not committed by some other person. Being present, they had the opportunity to commit the crime; but opportunity alone is not sufficient to justify a conviction, even though they are unable to show who did commit it. The burden still rests upon the prosecution to show, beyond a reasonable doubt, that the crime was actually committed by them, and not by some other person, and this burden is not sustained by proof of opportunity to commit the crime, not accompanied by proof that no other person could have had a like opportunity. There was no physical fact inconsistent with the commission of the acts by an intruder in the house, and if there is a reasonable doubt, from the evidence, as to whether they were committed by such person or by the defendants the conviction cannot be sustained."

In the instant case, it may be said that not only was there no proof by the Government that "no other person could have had a like opportunity", but, on the contrary, the evidence is consistent with the statement that several other persons had a like opportunity. For instance the

witness Watson [R. 48-49] testifies that at the time defendant and Cooper were having an argument on the boat deck, which was shortly before the time when the shots were heard, he, Watson, saw the figure of a man on the wing deck of the ship which was in closer proximity to the Captain's office than the place where defendant was seen on the deck below by the witness. The witness did not identify the person whose figure he saw there. Here is positive evidence that this person had an opportunity to commit this crime.

(2) Acts and Conduct Before the Shooting.

(a) *Defendant Shooting at Birds on the Trip.*

Each one of several of the Government's witnesses testified that on the trip from the Canal Zone to Manus he had observed defendant shooting at sea birds from the ship. Some of these witnesses testified that the pistol which defendant was using when thus seen was black and similar in appearance to Government's Exhibit No. 6, the gun found at the Captain's feet after the shooting. However, another of these witnesses [Test. Watson, R. 80] testified that the gun he saw used by defendant was silver-plated. Also, another of these witnesses [Test. Hamer, R. 83] testified that on one of these occasions he saw defendant run down to get his own gun to shoot at something that looked like a fish or a log in the water.

We fail to see how it can be claimed that this evidence connects the defendant with the shooting of the Captain. Indeed, one of these witnesses [Test. Noble, R. 100] in testifying to his observations when he saw defendant shooting at sea birds, states that, judging from what he saw defendant "was a very poor shot."

It is submitted that the person, whoever he was, that shot the Captain was not "a very poor shot." Every one of the six bullets fired from the gun found its mark in his body.

With reference to the same subject, certainly it is true that the mere act of shooting at birds by a ship's officer on a long and arduous trip at sea cannot be viewed as embodying any viciousness of character or purpose, and in and of itself constitute a perfectly innocent pastime. It is difficult to perceive how such conduct has any connection with the later commission of the crime involved.

(b) *Defendant's Intoxication.*

An examination of the record discloses the fact that defendant was in a very high state of intoxication before, at the time, and after the shots were fired which killed Captain Fithian. On the day in question, he showed evidence of intoxication even before dinner [Test. Zents, R. 74]. From somewhere about six o'clock p. m. to seven-thirty p. m. [Test. Hamer, R. 82-83], O'Leary was one of the party which spent that time in drinking in the Third Mate's cabin. Commencing about eight o'clock p. m., defendant continued drinking whisky, this time with the witness Cooper and in defendant's room [Test. Cooper, R. 42]. This drinking occurred at two different times. In the first instance each drank a water glass of whisky [Test. Cooper, R. 44]. Cooper then went to his own room and came back shortly thereafter to defendant's room, and he, with the defendant, spent the next half hour in continued drinking [Test. Cooper, R. 42]. This drinking continued until some ten or fifteen minutes prior to the shooting of the Captain [Test. Cooper, R. 42]. De-

fendant was intoxicated at the time of the argument with Cooper [R. 42].

When seen by the witness Kennon shortly after the shots were heard, defendant was so drunk that he staggered and had to hold on to the rail to steady himself [Test. Kennon, R. 94]. When going through the wheelhouse on leaving the captain's office defendant staggered [Test. Kennon, R. 94]. The witness Noble, Chief Engineer [Test. Noble, R. 99], states that of all the men on board the ship with whom he came in contact that night defendant was the most drunk. The significance of this testimony becomes apparent when we consider the further testimony of this same witness Noble [R. 100] that he found Cooper, the Third Assistant Engineer, with whom defendant had been drinking as aforesaid, so drunk that he ordered him off duty.

The extent of defendant's intoxication is further evidenced by his conduct in his cabin at and after the time the handcuffs were put on him, and in the presence of the ship's officers and the shore police. At this time he appeared like he was drunk or sick "he wasn't natural" [Test. Dunn, R. 89]. Defendant was drunk and when anyone present would say anything to him he would mimic them and say the same things back. He did that with several questions and answers and would repeat them in a drunken manner. When he was asked the question "Why did you shoot the old man", his answer did not make sense [Test. Berge, R. 103].

We have dwelt at length on this evidence showing defendant's high state of intoxication on the night in question, because we believe it to be highly relevant and material, and significant in at least two respects. First,

that it is sufficient to raise a *reasonable doubt* as to the possibility of any person in the intoxicated condition of defendant to have gone from the position in which he was last seen on the boat deck, arguing with Cooper, to the upper deck and the captain's office, to have procured the gun and fired the six shots (this interval covered only three to five minutes [Test. Watson, R. 48]) and then to have left the scene of the shooting and proceeded to the point where first seen by the purser, witness Kennon, and this in the short time that elapsed. Especially is this true when we consider the fact that he was so drunk that he was staggering. Further, we confidently assert that it is unreasonable to assume that a person in such condition could be of such poise and steadiness of aim as to be able to fire six shots from a pistol and to have every one of them find its mark in the captain's body.

This state of defendant's intoxication must further be borne in mind when we consider the force and effect to be given to the various statements alleged to have been made by the defendant on the evening in question. Manifestly, these statements cannot be given the same effect as if they had been uttered by a man who was sober at the time of their utterance.

(c) *Argument Between Defendant and Cooper.*

The witness Cooper was the Third Assistant Engineer [R. 42] and was the same person ordered off duty by the Chief Engineer Noble because of the extent of his intoxication [R. 100]. According to the testimony of Cooper, he and the defendant were together practically all the time from approximately eight o'clock p. m. [R. 41] when he, the witness, went to defendant's room

to drink, until about five minutes before nine o'clock p. m. at which time he and defendant parted on the boat deck [Test. Watson, R. 50]. Most of this time was spent in drinking in defendant's cabin. We have already (*supra,* p. 22) discussed the extent of this drinking. It seems that right after this drinking, these two parties, defendant and Cooper, engaged in some sort of an argument on the after boat deck on the starboard side of the ship, at a point marked C-1, near the lower left hand corner of Government's Exhibit No. 2 [R. 42].

The evidence is not clear as to the subject of the argument. Cooper testifies at one place [R. 44] that defendant criticized him for having been drinking with the crew. He further testifies [R. 42] that defendant ordered him to go from the starboard to the port side of the ship. Cooper further testified that during the argument, defendant said he was going to try to make Cooper go over to the other side of the ship and that witness told him he couldn't make him go, and defendant said "some words about a gun, I don't remember the exact words he said". "* * * I think O'Leary said if he had a gun he could make me, or he would get his gun and make me—something like that". Witness states that O'Leary was intoxicated at that time [R. 42]. This witness saw no gun in defendant's possession at any of the times in question [R. 46].

Witness Watson testifies [R. 48-49] that about five minutes of nine o'clock p. m., while he was standing

on the next lower deck and about forty feet to the rear of the place where Cooper and defendant were arguing, he heard some of the conversation. His testimony in this connection is as follows [R. 49].

> "I heard Mr. O'Leary tell him once to get over on his side of the ship and Mr. Cooper told him to put him over there if he thought he was big enough. Mr. Cooper told Mr. O'Leary that he might shoot him and put him over there, but he could not otherwise. Mr. O'Leary made no response to Mr. Cooper's statement. That was all I recall of hearing and seeing."

It is submitted that there is absolutely nothing in this evidence that tends to establish defendant's guilt. The conversation was nothing more than the irresponsible utterances of two drunken men. If it be argued that the use of a gun by defendant was mentioned in the conversation, then we reply that it is consistent with the testimony of the witness Cooper that he, and not defendant, first mentioned the gun. Also, the testimony of the witness Watson, above quoted, leads to this conclusion.

Our discussion of the evidence with reference to the stain alleged to have been observed on one of defendant's forearms in his cabin after the shooting (*infra,* p. ~~34~~ 36 v 37), as well as the authority cited in that connection apply equally to the evidence we are now discussing.

(3) Acts and Conduct of Defendant After Shooting.

(a) *Defendant's Question to Kennon "What's Happened?"*

The witness Kennon testified that when he first met defendant on the bridge deck in the passageway leading to the door of the captain's office, defendant said to him "What's happened"? [R. 92]. Kennon did not answer him, and nothing further was then said by defendant. At this time defendant was staggering and grabbed the rail [R. 94].

It is submitted that there is nothing in this statement in any way connecting defendant with the shooting of the captain, nor does this statement justify any inference that defendant had any knowledge of the shooting. On the contrary, the question indicates that the person asking it is seeking information. It is remembered that Kennon, at this time, was proceeding rapidly on some sort of a mission and this attracted the attention of defendant, and desiring to ascertain the cause of Kennon's mission, he asked him the question. It certainly does not indicate any knowledge on defendant's part of anything that had transpired. On the contrary, the only reasonable inference to be drawn from it in this connection is that the person who asked it was ignorant of anything that would explain the actions and conduct of Kennon at the time.

The above and foregoing discussion of this question asked by defendant has been on the assumption that defendant was, at the time he asked it, sober and rational and, even on this assumption, no inference of guilt or guilty knowledge can reasonably be drawn therefrom.

If this be true, it certainly follows that when we consider that the defendant, at the time he asked the question, was not sober, but, on the contrary, was staggering drunk, the most intoxicated man on the ship [Test. Noble, R. 99], the statement is entitled to no weight whatever.

(b) *Defendant's Alleged Statement "This Will Hold You for a While".*

(b-1) *The Testimony of Witness Zents That This Statement Was Made Is Effectually Contradicted by the Testimony of Witness Kennon.*

Government's witness Zents, the second mate, testified that between "20 and 30 seconds" after he, in his quarters on the deck below, heard the shots fired he saw defendant standing in the door to the captain's office. "I heard him make a remark, that 'This will hold you for a while', or something to that effect, but it left that meaning in my mind." [R. 57]. We have already discussed the improbability of the statement of this witness as to the short time elapsing between the time he heard the shots fired while he was in his own room on the deck below and the time when defendant was seen in the door to the captain's office (see *supra,* p. ~~5~~ 14).

The witness stated that at the time he heard the remark, he, the witness, was approximately 12 or 14 feet from defendant [R. 57]. This testimony is directly at variance with and is effectually contradicted by the testimony of the purser, Mr. Kennon, who, as we have heretofore shown (*supra,* p. ~~5~~ 13) was the first one to see defendant after the shots were fired. This latter witness saw defendant at or about the point marked C on Government's Exhibit No. 1 in the passageway, and that

defendant at that time said to the witness "What's happened?" [R. 92]. At this time, according to this witness, Zents was at the foot of the stairs on the deck below. Kennon further testifies that defendant turned around and started back along the passageway to the door of the captain's office, Point B on Government's Exhibit No. 1, and that the witness followed shortly behind him. The witness, Kennon, tried to look in the door but at first could not do so owing to defendant's presence in the doorway [R. 92]. Manifestly, this witness Kennon was closer to defendant at the time of the alleged utterance of the remark under discussion than was the witness Zents. He testifies positively [R. 94 and R. 95] that he did not hear defendant make any remark whatever while standing in the doorway or at any other time thereafter. It will be remembered that this latter witness testified that immediately prior to the time of defendant's presence in the doorway he, the witness, did hear the defendant ask him "What's happened?" Manifestly, if the alleged remark was, in fact, made by the defendant, the witness Kennon would have heard it. He did not hear it, and it, therefore, follows that according to this witness' testimony, no such remark was made by defendant.

(b-2) *The Witness Zents Was Impeached in This Connection.*

Within the next ten days immediately succeeding the shooting of Captain Fithian, the witness Zents was twice called upon by Government officials to give his version of the events occurring on December 9th. On Monday, the day after the shooting, the witness was questioned by a Board of Investigation which was investigating

the matter. He gave a statement to this board, and in this statement *he made no mention of the fact that he had heard defendant make a statement at the doorway into the captain's cabin* [Test. Zents, R. 66]. Subsequently, on December 19, 1945, just ten days after the shooting, at a hearing conducted by the officers of the United States Coast Guard, Zents was questioned as a witness by Lt. Frank D. Springer, Jr., United States Coast Guard. At this hearing, the testimony was taken down by an official reporter and a transcript thereof was submitted to the witness Zents and he was questioned concerning the same at the trial of this present action in the lower court [R. 66 to R. 73]. Zents testified that he was then in charge of the vessel and had a fair recollection of the events of December 9th. During this examination, and after Zents had testified that he had seen defendant in the door to the captain's office right after the shooting, he was asked to state what, if anything, defendant had said on this occasion, and he answered "Nothing".

(b-3) *The Statement Itself, If Actually Made, Does Not Implicate the Defendant in the Shooting.*

Even though we disregard the direct contradiction of Zent's testimony on this point by the witness Kennon, and further disregard the impeachment of Zents by his own statements on two occasions within ten days after the occurrence, and assume for the purpose of this argument that the alleged statement was, in fact, made, appellant insists that considered in its entirety and the circumstances under which it was allegedly made, the intrepretations that may be placed upon it are equivocal

and in no event can it be said that it, in and of itself, implicates the defendant with the firing of the shots which killed Captain Fithian.

It is agreed that had the statement been made an integral part of the actual shooting of the captain, it would have been explanatory of that act and a part of the *Res-Gestae,* and, under such circumstances, it might well be said that the statement indicated an intentional act and explain the same. Such was not, however, the case here. Here was a man, admittedly in a drunken condition, who staggers up to the door of the captain's room and, unable to stand, grabs on to the bulkheads, apparently sees the body of the captain and makes the statement "This will hold you for a while" or words to that effect. There is nothing in the statement that ties it up with the shooting, and nothing in its import that implicates the declarent in the shooting.

Again, it must be borne in mind that the witness' answer originally was as follows [R. 57]. "I heard him make a remark, that 'This will hold you for a while,' or something to that effect, but it left that meaning in my mind." It is true that the portion of the answer following "This will hold you for a while" was stricken on the Court's own motion, but we submit that it is extremely important to consider it on the issue here presented for the reason that what the witness was testifying to was not in truth and in fact what the defendant had said, but only the impression that it had made upon the witness.

Again, it must be remembered that at the time in question defendant was highly intoxicated. The witness Kennon [R. 94] testifies that defendant was so drunk

that he staggered from point C. to the door of the captain's office wherein he was standing at the time of the alleged statement, and that immediately thereafter he staggered through the wheelhouse on leaving the scene. Shortly thereafter, several of the witnesses who saw defendant in his own cabin at the time he was handcuffed state that he was highly intoxicated. One of them, witness Berge [Test. Berge, R. 103], testified "Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner."

It is submitted that a statement made under the circumstances shown by the record by a drunken person, intoxicated to the extent that defendant was, cannot be measured or considered by the same standards or given the same effect as if uttered by a normally rational person.

(c) *Noble's Statement "My God, Frank, Haven't You Done Enough Harm Already?"*

The witness Noble [R. 97] testified that upon hearing the shots while on the boat deck he proceeded to the captain's quarters on the upper deck and looked into the captain's office and saw the body lying there. He then went down on the lower deck and met and passed defendant in the passageway in front of "2 Cadets" room; defendant was apparently going from his own room and that the witness "merely passed him" and on passing said to him "My, God, Frank, haven't you done enough harm already?" and that defendant made no reply.

What is there in this voluntary statement of Noble's to indicate that it refers, in any way, to the shooting of the captain. There is no proof that defendant knew that Noble had seen the captain's body. There is no proof that Noble knew or had been informed of defendant's presence on the upper deck after the shots were fired.

Manifestly, the only relevancy or materiality of this statement of Noble's lies, not in the fact of its utterance or in its particular language, but in the effect it would produce in the mind of the defendant and his consequent reaction thereto.

There is, we submit, nothing in this statement to indicate what the speaker had in mind as to any previous action or conduct of defendant, much less is there anything to justify the inference that defendant should have interpreted this statement as an accusation that he had shot the captain.

If it be claimed that defendant's failure to respond to this statement has any tendency to prove defendant's guilty knowledge of the shooting of the captain, we submit that there is nothing in the statement which, even to a person of normal mental condition, would indicate that the speaker was referring to the shooting of the captain. When we again consider the highly intoxicated, mental condition of the defendant at this time, it is reasonable to assume that he paid no attention to it and that it did not register in his mind.

(d) *Conduct and Statements in Defendant's Cabin.*

(1) Handcuffing of Defendant.

Shortly after the shots were heard Zents, Noble and Berge went to the cabin of defendant, found him getting into his bunk and placed handcuffs on him [Test. Berge, R. 102-104; Test. Noble, R. 98; Test. Zents, R. 61]. This was prior to 9:25 p. m., because at this latter time defendant was already handcuffed [Test. Meacham, R. 87]. Berge remained with defendant until defendant was taken off the ship by Berge and placed by him in the guardhouse at Manus. This was a few hours after defendant was handcuffed [Test. Berge, R. 105]. There were also present in defendant's cabin at this time, Meacham and Dunn, members of the crew of the vessel and also the ship's carpenter [Test. Meacham, R. 87]. Subsequently, and prior to defendant's departure from the ship, several naval officers, including Lt. Commander Regan, Provost Marshal, some shore police and a doctor came aboard the ship and several of these persons were in defendant's cabin at the time of the making of certain statements by the defendant hereinafter discussed.

We have already discussed in detail defendant's intoxication even at this time (*supra,* p. 22). As heretofore stated, defendant was handcuffed and, therefore, in custody, having been ordered into custody by Zents [Test. Zents, R. 61], who was then in command of the vessel [Test. Zents, R. 67].

(2) Stain on Defendant's Forearm.

Two of the Government's witnesses, Meacham [R. 87] and Dunn [R. 89], testified that they had observed a stain on one of defendant's forearms. Neither remembered which forearm it was. The Witness Meacham [R. 87] stated that the stain was dry. With reference to this stain, the witness Meacham testified as follows [R. 87]:

> "Naturally at that time I would think it was blood, but it could have been anything; it could have been cocoa or rust or anything, but it was dry, the stain that I saw. I have seen blood that is dried, but I cannot say whether or not the stain on O'Leary's arms appeared at that time to resemble blood that I had previously seen."

The witness Dunn [R. 89] testified as follows:

> "He was handcuffed and I noticed a stain on one of his arms. I am not positive which arm. It was red the color of blood; I don't know whether it was blood or not, I think it was blood. It was a smear a few inches long and maybe two inches wide."

This evidence, we submit, is so weak, indefinite and uncertain that it is entitled to no weight whatever. In the first place, the witness Meacham positively states he could not say the stain apparently resembled blood, and all the witness Dunn would say was "I think it was blood." Also, it is a significant fact that not one of the other numerous witnesses who saw defendant in his cabin that night testified as to observing this stain, or any evidence of blood on the person of the defendant. Zents [R. 75]; Noble [R. 99]; and Berge [R. 102] all testified positively that they saw no evidence of blood

on the person of defendant that night. These three witnesses, it must be remembered, took part in the actual handcuffing of defendant and undoubtedly were in a position to see any evidences of blood on defendant's forearm, if any there existed. In addition thereto, the stipulation of the Government [R. 107] is to the effect that no blood stains were found on defendant's shirt and trousers worn by defendant on the occasion in question.

At this point, we respectfully refer this Court to the decision of the New York Court of Appeals in *People v. Taddio,* 292 N. Y. 488, 55 N. E. (2d) 749. This was a homicide case. Two of the State's expert witnesses testified that they found indications of blood on the seat of defendant's automobile which had been on previous occasions occupied by decedent, and also, found indications of blood on the clothing of defendant. One of these witnesses testified that all he could say after his tests was that there was a possible presence of blood in the areas of the car which he tested. The other of these witnesses testified that after his tests he was unable to state whether or not the blood that he had found in the car was that of the decedent.

The Court held this evidence was so weak and uncertain as not to be of any weight as a circumstance in determining the defendant's guilt. In discussing the weakness and uncertainty of this and evidence of other like circumstances, the Court used the following language (55 N. E. (2d) 754):

> "In this case where the prosecution, of necessity, resorted to circumstantial evidence to establish the defendant's guilt, there was imposed upon the People an unusual burden which required not only the elimi-

nation of 'reasonable doubt whether his guilt is satisfactorily shown' (Code Cr. Proc. Sec. 389) but also the elimination of uncertainty as to those asserted facts from which inferences of defendant's guilt were drawn. Close scrutiny of this record reveals however that in vital phases of the proof uncertainty abounds where certainty is required. The instances to which we have referred, and others not mentioned, leave us unconvinced that the evidence upon which the judgment of conviction rests satisfies the test for circumstantial evidence. *People v. Woltering,* 275 N. Y. 51, 61, 9 N. E. 2d 774, 777, and cases cited *supra.* Here, as in *People v. Galbo, supra,* 218 N. Y. page 294, 112 N. E. page 1045, 2 A. L. R. 1220, '* * * conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt.' "

It is a perfectly reasonable explanation that this mark designated as a stain by the two witnesses above mentioned was nothing more than a bruise caused by the striking of the handcuffs on the forearm of defendant.

(3) Defendant's Question "Did I Shoot Him?"

The witness Berge testified on direct examination [R. 102] that while he was in defendant's cabin, after defendant had been handcuffed, he had asked defendant why he, defendant, had shot the captain and that defendant did not answer.

On cross-examination [R. 103] he was confronted with his testimony given at the hearing before the United States Commissioner in January, 1946, in which he stated, in referring to this incident, that defendant had asked him "What is the matter?" and that he, the witness, had replied "Well, I asked him why he shot the old

man", to which defendant replied "Did I shoot him?" and "he had sort of a far-away look on his face when he did so" [R. 104]. The witness admitted that he had given such testimony at said hearing, but stated that the conversation referred to took place in the guardhouse in Manus [R. 103]. Subsequently, on this same cross-examination, he testified that all of this conversation had taken place in defendant's cabin [R. 105], and again on redirect examination [R. 105], he stated that defendant, in the guardhouse in Manus, several hours after the conversation in defendant's cabin, had "said the same thing to the same effect, 'Did I shoot him?' "

This witness Berge admitted [R. 102] "I had four or five drinks altogether that night and I was feeling pretty high. I was talking too much for my own good." This same witness, in speaking of defendant's condition at the times in question, testified as follows [R. 103]: "Mr. O'Leary was drunk that night in his room and when people would say things to him he would mimic them and say them right back. He did that with several questions and several answers, and when Dunn or I would say something to him he would repeat it in a drunken manner."

One of the most significant things which suggests itself when this testimony is considered, is the fact that Berge is the only witness who mentions any such conversation, notwithstanding the fact that several other persons, including Meacham, Noble, Zents and Dunn were all there at the time [R. 102]. Each of these named persons was called as a witness and none of them referred in any way to this alleged conversation.

Here we find defendant in his bed in his own cabin when some five men enter and place him in handcuffs. What more natural than that he should ask "What's the matter"? This statement would indicate that defendant did not know why these persons had come into the room and placed the handcuff's on him. He wanted to know the reason for this intrusion, so he asked "What's the matter"?

This condition of things was of sufficient import to prompt a question of this character from even a man as drunk as the defendant was.

After this question of defendant, the witness states that he said to defendant "Why did you shoot the captain?" to which defendant responded "Did I shoot him?" We submit that there is nothing in this response which can be construed as an admission that defendant had anything to do with the shooting of the captain. On the contrary, if interpreted literally, it implies ignorance on behalf of defendant as to who did the shooting and nothing more. There is nothing in the record to indicate that this implication that he was ignorant of who shot the captain was not true.

When we consider first, the absence of any corroborating evidence from the other persons present; second, the fact that on direct examination the witness stated defendant made no response to the question as asked him by the witness, and third, the admitted intoxicated condition of the witness himself on the occasion in question, we are led to the unavoidable conclusion that this testimony is, to say the least, very weak and unconvincing.

However, the statements and conduct of defendant, even as testified to by this witness, fall far short of showing any acquiescence on defendant's part in the question asked him by the witness as to why he shot the captain or the old man. And, likewise, this evidence fails to show any consciousness of guilt on the part of the defendant in the shooting of the captain and this, even if we assume, contrary to the evidence, that defendant was at this time in the full possession of his mental faculties and possessed the mental capacity to comprehend what he was saying.

(4) Defendant's Question "Where Is Captain Fithian?"

The witness Meacham testified that on the evening in question, and while the parties were in defendant's cabin, defendant asked the Deck Engineer (Noble) where Captain Fithian was, to which the deck engineer responded that the captain had gone ashore, whereupon, defendant stated that he knew well that he hadn't. This testimony, like that of Berge just discussed, stands absolutely uncorroborated, and this notwithstanding the fact that at least three or four other persons [R. 87] were present at the time and two of these persons (Noble and Dunn) testified as witnesses for the Government on the trial without mentioning or referring to any such conversation.

In approaching a discussion of the effect of this evidence, we must again remind ourselves of the intoxicated condition of the defendant. Manifestly, his acts and statements are not to be judged by the same standard as if he were sober. However, even if it be assumed that defendant was in full possession of his mental faculties and thoroughly comprehended the meaning of what

was said to him and his replies thereto, we fail to see how his statement that he knew that the captain had not gone ashore can be construed as an admission that he had any guilty knowledge of the shooting of the captain, and much less, that he had participated therein. The question he first asked, as to where the captain was, was but natural when we consider the circumstances under which it was made. The several officers of his ship had entered his cabin and placed handcuffs on him and placed him in custody. Under such conditions the master of the ship would unquestionably be present. Defendant noticed his absence and asked where he was. It would thus appear that he had it in mind that the captain might have been at that time present. Certainly, it cannot be claimed that he knew the captain was then dead.

What, then, is there in the record to justify any inference that when defendant subsequently stated that he knew the captain had not gone ashore he had in mind that the reason was the captain was dead? To give this evidence any effect toward indicating the guilt of the defendant in the shooting of the captain requires that we indulge not only in this presumption, but, likewise, that we extend it so as to make it the equivalent of an admission that the reason why he knew the captain had not gone ashore was that he, defendant, had shot him.

It is submitted that there is nothing in this particular evidence justifying any such far-fetched assumption. Not

only is this true, but to do so involves a direct violation of the principle of the presumption of defendant's innocence and the doctrine of reasonable doubt. This is well illustrated by the decision of this court in *Paddock v. United States* (C. C. A. 9), 79 Fed. (2d) 872. In this case, one of the vital issues was whether or not defendant had received from one Maris the sum of $2,000.00, which he, defendant, had failed to report in his income tax return. Maris, as the Government witness, testified he had given the money to defendant. Defendant denied that he had received it. This Court, in criticizing and condemning an instruction given by the lower court as to this conflict in the evidence, emphasized the fact that the jury should consider the fact that defendant's testimony was aided by the presumption of innocence, and in this connection used the following language (79 Fed. (2d) 872 at 876):

> "If, as implied by the court to the jury, the question of guilt depended upon the relative veracity of these two witnesses, the defendant was aided by the presumption of innocence in the determination of his guilt, and, consequently, of such relative veracity, and the doctrine of reasonable doubt was directly applicable to the situation. In this instruction the jury were not only informed that their belief was the criterion which should guide them in their decision, but they are specifically informed that the doctrine of reasonable doubt did not apply."

(5) The Gun Episode in Defendant's Cabin.

The witness Dunn [R. 90] testified on direct examination that when the shore police arrived defendant, who was still in his bed, "threatened to shoot us. He said if he could get his gun he could out-shoot any of them and he made an effort to go down below in his bunk"; that he, Dunn, grabbed defendant and pushed him back in his bed; that there is a drawer under the bunk. On cross-examination [R. 90], this witness further testified that the shore police were there in the cabin when defendant made some mention of the fact that he could out-shoot them, "and one of the shore police pulled out his gun and cocked it and threatened to shoot; that was when O'Leary reached down in his bunk. Then the shore police pulled out a gun and said if O'Leary didn't lie down he would shoot. I threw O'Leary down. Nobody got down to look for the gun."

The shore police arrived about 10:30 p. m. [Test. Zents, R. 65]. As heretofore shown (*supra* (d-1), p. 34), defendant had been placed in handcuffs about 9:20 p. m., and hence, had been in custody and under constant guard for fully an hour when the shore police arrived. It is unnecessary to again dwell on his intoxicated condition during this time.

It is again significant that this testimony of the witness Dunn stands absolutely uncorroborated, notwithstanding the fact that many other persons were present in defendant's cabin at the time to which it relates, in-

cluding some of the persons who testified as witnesses for the Government. When the shore police arrived they undoubtedly had guns on their person—indeed, one of them pulled out his gun, cocked it and threatened to shoot, and that was when defendant made an effort to go down below in his bunk.

We submit that it is reasonable to infer that the thing which first prompted defendant to say that he could out-shoot any of them was the sight of these guns on the person of the shore police.

While the witness testified that defendant "threatened to shoot us" he does not state that defendant said anything to this effect. Indeed, this entire testimony, both direct and cross-examination, is consistent with the assumption that defendant said nothing except that he could out-shoot any of them, and that he did not reach down in his bunk until after one of the shore police had himself pulled out his gun, cocked it and threatened to shoot. The witnesses' statement that defendant "threatened to shoot us" was evidently nothing more than his conclusion from the action of defendant in reaching down in his bunk toward the drawer.

Incidentally, it may be remarked that there is no evidence that there was any gun in the drawer, nor that there was any attempt by any one present to ascertain the contents of the drawer.

We submit that when defendant's intoxicated condition, together with the circumstances surrounding defendant's actions and conduct on this particular occasion are taken into consideration, there is nothing in them which tends to show defendant's participation in the shooting of the captain.

Conclusion.

Summarizing the evidence then, we find:

1. There is no direct evidence connecting defendant with the shooting of Captain Fithian.

2. There is no evidence of motive, envy, ill will or provocation for defendant to have committed the crime.

3. There is no evidence of flight or resistance to arrest.

4. The Government had available certain important and relevant, and perhaps vital, evidence (finger prints on gun) as to who fired the gun which was used to shoot the captain and failed to produce it or explain its absence; this justifies the presumption that defendant's finger prints were not on the gun.

5. A bloody footprint was found on a piece of paper in the captain's stateroom; no evidence of blood was found on defendant's feet, or his socks or shoes.

6. Nor was any evidence of blood found on the clothing worn by defendant on the occasion. While two of the witnesses testified that they saw a stain on defendant's forearm, neither of them would testify positively that it was a blood stain. Three other witnesses testified that no evidence of blood was found on defendant's person.

7. While it may be argued that defendant possibly had an opportunity to commit the crime, yet it was not shown that no one else had such opportunity. On the contrary, the evidence shows that other persons did have such opportunity.

8. As to the acts and conduct of the defendant, including some five or six statements made by him after the shooting, certain it is that none of them amounted to

an admission or confession of guilt. Their effect must be measured by the fact that defendant was in a high state of intoxication at the time, and we believe that we have already shown, they are not inconsistent with a reasonable hypothesis of defendant's innocence.

In the foregoing discussion of the evidence in this case, we have endeavored to give a complete review and analysis thereof and especially of all those circumstances which it could possibly be claimed tend to show defendant's guilt. It is true we have attempted to interpret each of these circumstances as being consistent with the hypothesis of defendant's innocence, however, in so doing we are but applying the principle so often laid down by this Court and particularly emphasized in *Paddock v. United States* (*supra*), wherein the Court condemned an instruction which stated that, in cases such as this, the evidence must not only be consistent with defendant's guilt, but also inconsistent with defendant's innocence, because of the fatal omission therein to further state that such evidence must also be inconsistent with every reasonable hypothesis of defendant's innocence.

Also, it may be said that our right to so interpret and construe these various circumstances is fortified by the doctrine of the Federal Courts where one circumstance or a set of circumstances is equally susceptible of two opposite interpretations, the one favorable to defendant's guilt, the other to his innocence, the latter must prevail.

Neal v. United States (C. C. A. 8), 102 Fed. (2d) 643.

Lest we yield to the temptation to assume defendant's guilt *solely* for the reason that this assumption may afford an explanation for an otherwise unsolved crime, we know of no better way to close this brief than by emphasizing the admonition of the Court in *Osbon v. State,* 213 Ind. 413, 13 N. E. (2d) 223 at 229, wherein the Court used the following language:

> "The life or liberty of a person cannot be legally sacrificed on the ground that only by regarding him as guilty an explanation is afforded of the perpetration of a proved offense."

It is submitted that the judgment and conviction should be reversed.

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